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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 35, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF MAINE, ET AL.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION BY THE COMMONWEALTH OF MASSACHUSETTS

STATEMENT

This is an action between the United States and 12 Atlantic Coast States, including the Commonwealth of Massachusetts, to determine the respective rights of the parties to the natural resources of the seabed and subsoil of the continental shelf of the United States in the Atlantic Ocean more than 3 geographical miles seaward of the coastline. The case was referred to a Special Master on June 8, 1970. 398 U.S. 947. Hearings have been concluded and the Post-Trial Brief for the United States is due to be submitted to the Special Master in June 1973. On May 18, 1973, Massachusetts filed the present motion for a preliminary injunction, seeking to enjoin the United States

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from drilling or boring for oil and gas exploration, or for other general or specific data-seeking purposes, beyond a depth of 25 feet below the water column, within the area of the Atlantic continental shelf claimed by Massachusetts in this litigation.

1. Massachusetts' motion is substantially similar to its motion for a preliminary injunction made to this Court on June 9, 1972. At that time the State sought to enjoin the federal government from conducting or authorizing any exploration for the location or probable location of the natural resources of the seabed and subsoil of the Atlantic Ocean which is claimed by Massachusetts, or communicating any information obtained through such activities. The apparent factual basis for that motion by Massachusetts was the issuance by the federal government of a permit to conduct seismic, geophysical exploration in the area of the shelf claimed by Massachusetts in this litigation. The State alleged that the accumulation of information about the shelf would result in irreparable injury to the State and would disrupt the status quo during the litigation. The Court denied the motion. 408 U.S. 917.

As noted at pages 2–3 of our June 1972 brief in opposition to Massachusetts' previous motion for a preliminary injunction ("1972 Br."), the parties' differences over the rights of the federal government to continue exploration activities during the pendency of these proceedings date back to 1971. In late 1971, the defendant States expressed concern to the federal government that their rights in this litigation were being threatened by activities of the federal government in

the area of the Atlantic continental shelf. The United States met with representatives of the defendant States, including Massachusetts, in Philadelphia, on December 7, 1971, and outlined the procedures involved in the exploration and exploitation of the resources of the seabed under Section 11 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1340, and explained those activities in which it would engage as well as those activities in which it would refrain from engaging during the pendency of the litigation without the consent of the defendant States. As noted in our earlier brief (1972 Br. 2–3), the United States unequivocally stated that it would continue with geological and geophysical exploration and informal information gathering activities which would include seismic tests and shallow core sampling. Shallow core sampling, it was explained, does not constitute deep drilling which can be done only pursuant to an exploitation lease. The United States also stated that it would not take any formal preleasing action which it described as including the call for nominations, preparation and circulation of an environmental impact statement and notice of sale of leases, among other things.

This understanding between the United States and the States, including Massachusetts, was confirmed by an exchange of correspondence with the defendant States subsequent to the meetings. The United States has in good faith continued to abide by this commitment, with the apparent approval of all the Atlantic States except Massachusetts.

2. On April 18, 1973, President Nixon stated in his Energy Message to Congress (9 Presidential Documents 389, 393–394):

> I am also asking the Chairman of the Council on Environmental Quality to work with the Environmental Protection Agency, in consultation with the National Academy of Sciences and appropriate Federal agencies, to study the environmental impact of oil and gas production on the Atlantic Outer Continental Shelf and in the Gulf of Alaska. No drilling will be undertaken in these areas until its environmental impact is determined. Governors, legislators and citizens of these areas will be consulted in this process.

The United States does not intend to conduct even shallow core drilling in the area claimed by Massachusetts in this case before the environmental impact of such drilling has been determined by the Council on Environmental Quality.

On May 1, 1973, members of the Department of the Interior met with Massachusetts officials to describe federal plans to authorize for information gathering purposes shallow core drilling at specific locations on the Atlantic Outer Continental Shelf off Massachusetts. While the plans called for a maximum penetration into the seabed of 1000 feet, it was explained that actual penetration into consolidated material[1] would not exceed 50 feet. The remaining drilling through

[1] Oil and gas are found only in consolidated material. The purpose of shallow core drilling, however, is not to discover oil or gas, but to gather information on rock formations (see p. 7, *infra*).

unconsolidated material such as sand and mud would be necessary simply to reach the consolidated material from which core samples would be taken. The federal representatives also informed the Massachusetts officials that no final decision to authorize the shallow core drilling had been made. Subsequent to the May 1 meeting, the United States decided not to authorize any shallow core drilling off Massachusetts this summer.

In its present motion, Massachusetts alleges that the proposed drilling would be unlawful and contrary to the rights of exclusive exploration and exploitation asserted by Massachusetts in this litigation, that the marine environment in Massachusetts would be exposed to irreparable injury for which there is no adequate remedy at law, and that a preliminary injunction is necessary to preserve the status quo until the merits of the case can be decided.

In our view the questions raised by this motion are essentially the same as the questions raised by Massachusetts' previous motion.

ARGUMENT

As we argued in response to Massachusetts' initial motion (1972 Br. 4), it is well established that a preliminary injunction is extraordinary relief which is not granted by the courts except in cases clearly warranting it. *Connecticut* v. *Massachusetts,* 282 U.S. 660; *Dymo Industries, Inc.* v. *Tapeprinter, Inc.,* 326 F. 2d 141 (C.A. 9). When a motion for a preliminary injunction is presented, a court is called upon to exercise its discretion on the basis of its estimates concerning

the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of ultimate success or failure of the suit, and the balancing of damage and convenience generally. Unless the party seeking such extraordinary relief can satisfy the court that the relief is warranted on the basis of all these considerations, the injunction will be denied. *Doeskin Products, Inc.* v. *United Paper Co.*, 195 F. 2d 356 (C.A. 7).

I

THERE HAS BEEN NO CLEAR SHOWING OF IMMINENT IRREPARABLE HARM TO THE STATE

In its motion, Massachusetts alleges (p. 51) that the shallow core drilling being considered by the United States poses a serious threat to the State's environment because an accidental penetration of an oil retaining structure would result in incalculable damage to recreational facilities, the fishing industry and marine ecology generally. Massachusetts recognizes that "the Federal Government has at present complete freedom to conduct seismic surveys and 'shallow' core sampling * * *" (p. 52). We are informed by the Department of the Interior that the contemplated drilling comes within the meaning of shallow core sampling as that term is generally understood. Rather than contend that the proposed drilling does not come within the definition of shallow core drilling, the State alleges that the proposed 1000-foot holes create a radically increased magnitude of risk to the environment and are therefore a fundamental departure from alleged previous practice (p. 48).

Massachusetts' allegation of environmental risk misconceives the nature of the federal government's proposal. As noted above, a core sample comes only from consolidated material and the United States proposes to drill only 50 feet into such material.

The purpose of shallow core drilling is to determine the age and characteristics—such as rock type, mineralogy, chemical composition, organic matter content and interstitial water composition—of the rocks that underlie the surface of the continental margin. The object is not to locate accumulations of gas and oil, but to provide data about the sedimentary materials that form the bulk of the continental margin so that reasonably accurate predictions can be made about the age and physical and chemical characteristics of materials to be found under other areas of the continental margin. Sites have been carefully examined by geophysical methods to avoid geological structures which might contain pockets of hydrocarbons. The 50-foot maximum drilling depth is much less than the depth at which hydrocarbon traps are normally found throughout the world. We have been informed by the Department of the Interior that if and when shallow core drilling is conducted by the United States off the coast of Massachusetts, the penetration of gas or oil deposits will be highly unlikely; the accidental release of oil and gas from such drilling would be even less likely.[2]

[2] In its motion, Massachusetts seeks only to enjoin drilling "beyond a depth of twenty-five feet below the water column * * *" (p. 2), since it "does not seek to enjoin mere

Even if there were a significant chance that oil or gas might be released into the sea by shallow core drilling, the likelihood of substantial damage to the environment has not been shown. The proposed core sampling site nearest to the coast of Massachusetts is more than 50 miles offshore. Current and wind directions on George's Bank indicate that material floating on the surface would move offshore and is unlikely ever to reach the land. Whether damage to the fishing industry and marine ecology would result from shallow core drilling is highly speculative.

In any event, no shallow core drilling will be authorized without the additional study of the potential environmental impact pursuant to the President's Energy Message. If there is drilling, precautions will be taken to prevent pollution in the unlikely event that oil or gas is encountered.

It is well established that in order to justify a preliminary injunction, the threat of injury must be real not fancied, actual not prospective, and threatened not imagined. *Connecticut* v. *Massachusetts,* 282 U.S. 660. Massachusetts has not shown that the shallow core drilling which the United States may undertake in the

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technical violations of what it claims to be its exclusive exploration rights, but only acts which pose a serious threat to its environment" (p. 52). But the deepest penetration of consolidated material (some of which is located on the ocean floor and some of which is buried under substantial layers of unconsolidated material) contemplated by the federal government is only 50 feet. Massachusetts has not shown that the drilling of a 50-foot hole in consolidated material entails a substantially greater risk of environmental harm than the drilling of a 25-foot hole.

future under conditions not yet fully developed will present a real threat to its environment.

II

THERE HAS BEEN NO SHOWING OF A REASONABLE PROBABILITY OF SUCCESS

In order to justify a preliminary injunction, Massachusetts must make a showing of a reasonable probability that it will succeed in the litigation. *American Metropolitan Ent. of N.Y.* v. *Warner Bros. Records,* 389 F. 2d 903 (C.A. 2). However, the State has made no attempt in either its initial or its present motion to make such a showing.

The United States, on the other hand, in its Motion for Judgment on the Pleadings (pp. 11, 18, 21–24), has argued that this Court's decisions regarding State claims in the Pacific Ocean and the Gulf of Mexico, as well as congressional action, established the right of the United States as against the States to the natural resources of the seabed and subsoil of the outer continental shelf in the Atlantic Ocean. *United States* v. *California,* 332 U.S. 19; *United States* v. *Louisiana,* 339 U.S. 669; *United States* v. *Texas,* 339 U.S. 707; Submerged Lands Act, 43 U.S.C. 1301–1315; Outer Continental Shelf Lands Act, 43 U.S.C. 1331–1343; *United States* v. *Louisiana, et al.,* 363 U.S. 1. While the States in this action were not parties to those cases and thus are not bound by them as *res judicata,* Massachusetts has not shown that there is a reasonable probability that this Court will now overrule or otherwise depart from those prior holdings.

III

THERE HAS BEEN NO CLEAR SHOWING THAT THE STATE WILL SUFFER GREATER HARDSHIP THAN THE UNITED STATES

The third requirement which the State has failed to meet in order to justify the granting of an injunction is a showing that it will suffer greater hardship if the injunction is denied than the United States will suffer if the injunction is granted.

Massachusetts contends that the United States will not suffer any material damage from the granting of a preliminary injunction (p. 53). This assertion, however, overlooks the fact that both the President and Congress have recognized the imminent threat of an "energy crisis" in the United States. This Court can take judicial notice of the current national shortage of petroleum.

Critical decisions must be made in the near future by the President and Congress with respect to how to meet the energy crisis. It is obviously desirable that these decisions be based on as complete an evaluation of the scope of our natural resources as possible. If an injunction is granted to Massachusetts in this case, information concerning one alternative source of energy will be less complete and will remain incomplete for as long as the injunction remains in force. The result, of course, would be that decisions relating to the development of United States energy sources will be impaired. It is in the interest of the United States to obtain information now on the seabed resources off the Atlantic coast so that, if the United States ultimately prevails on the merits and

determines that mineral exploitation of the continental shelf is desirable, leasing may proceed expeditiously.

Finally, as we noted in our brief in opposition to Massachusetts' previous motion (1972 Br. 9), exploration of the Atlantic seabed has been in progress since 1960 and the proposed shallow core drilling represents only the latest step in the information collecting process. Apart from seismic or geophysical exploration already conducted, approximately 15 shallow core samples have already been taken from holes of up to 1000 feet off the Atlantic coast. This sampling extended from the Cape Hatteras, North Carolina area almost to the Canadian border. No oil or gas pockets were penetrated. To deny the United States now the authority to authorize such activity would alter the status quo that has existed since 1960.

CONCLUSION

For the foregoing reasons, Massachusetts' motion for a preliminary injunction should be denied.

Respectfully submitted.

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